IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.06.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Civil Miscellaneous Appeal No.1111 of 2007

Commissioner of Central Excise,
Chennai III Commissionerate,
Chennai-600 034. ..Appellant

Vs.

1. M/s.Saralee Household & Bodycare India (P) Ltd.,
   Unit I, E.S. Industrial Estate,
   Maraimalai Nagar,
   Chennai-603 209.

2. Customs, Excise & Service Tax Appellate Tribunal,
   South Zonal Bench,
   Shastri Bhawan Annexe,
   I Floor, 26, Haddows Road,
   Chennai-600 006. ..Respondents

Appeal under Section 35G of the Central Excise Act, 1944 against the Final Order No.899 of 2006 dated 21.09.2006 on the file of the Customs, Excise & Service Tax Appellate Tribunal, South Zone Bench, Chennai.

For Appellant : Mr.K.Ravichandrabaabu, SCCG

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JUDGMENT

(Judgment of the court was delivered by
P.P.S.Janarthana Raja, J.)

This appeal is filed by the Revenue against the Final Order No.899 of 2006 dated 21.09.2006 on the file of the Customs, Excise & Service Tax Appellate Tribunal, South Zone Bench, Chennai, raising the following substantial questions of law:-

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1. Whether the Hon'ble Tribunal is right in holding that the assessee had successfully rebutted the presumption of unjust enrichment contained in Section 12B of Central Excise Act, 1944, relying on the case of Pride Foramer Vs. Commissioner of Customs (2006 (200) ELT 259 (Tri-Mumbai), wherein the certificate of Chartered Accountant was accepted as rebuttal of the presumption, when the issue in that case was refund of Security deposit whereas the question in the instant case is that of refund of Excise duty?

2. Whether the Hon'ble Tribunal was right in holding that ratio of the Apex Court's decision in the case of Commissioner Vs. M/s.Allied Photographics India Ltd. (2004 (166) ELT (SC) had not been correctly applied to the facts of this case by the department, when it is an admitted position of increase in prices during the disputed period and when it had been held by the Hon'ble Supreme Court that even uniformity in price before and after the assessment did not lead to the inevitable conclusion that incidence of duty had not been passed on to the buyer?

2. The brief facts arising out of this Appeal are as under:

The assessee company is engaged in the manufacture of Dranex 50g, Dranex 400g and Flush Kleen Powder 500g among other products. The assessee had classified the above products under Central Excise Tariff Sub Heading 3402.90 and paid the duty @ 30% upto February 1992. Subsequently, the assessee company felt that their products were classifiable under Ch.3405.40 (Duty payable @ 20%). Since the classification filed by the assessee company earlier under 3402.90 was not approved, they resorted to pay the duty (as applicable to 3402.90) under protest and filed their letter of protest on 09.03.1992 with the Assistant Commissioner of Central Excise, Madras VIII Division. The said Assistant Commissioner of Central Excise confirmed the classification of the disputed products under Ch.3402.90. Aggrieved by the order, the assessee filed an appeal to the Commissioner (Appeals). The said Commissioner (Appeals), allowed the appeal with a consequential benefit thereby revising the classification of the products from 3402.90 to 3405.40. In consequence of the same, the assessee filed a refund claim for Rs.17,94,892/- being the differential duty paid by them under protest. Later, the Assistant Commissioner of Central Excise, issued a Show Cause Notice as to why their refund claim should not be restricted to Rs.17,69,141/- and why the reduced amount should not be sanctioned and credited in the Consumer Welfare Fund. The assessee replied to the above

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Show Cause Notice and the Assistant Commissioner of Central Excise passed an order dated 22.06.1998 rejecting the refund claim filed by the assessee. Aggrieved by the order, the assessee filed an appeal to the Commissioner of Central Excise (Appeals). The Commissioner of Central Excise (Appeals) rejected the appeal and confirmed the order of the Assistant Commissioner of Central Excise. Aggrieved, the assessee filed an appeal to the Customs, Excise & Service Tax Appellate Tribunal ("Tribunal" in short). The Tribunal allowed the appeal and revised the order of the Commissioner of Central Excise (Appeals). Hence the present appeal by the Revenue.

3. Learned counsel appearing for the Revenue submitted that the assessee failed to prove to the satisfaction of the authorities that the assessee had not passed on the excess burden and unless it is proved, the assessee is not entitled to the refund. Hence the orders passed by the lower authorities are in confirmity with law.

4. Heard the counsel. It is seen from the records that what was collected by the assessee from the buyers was only the price of the goods plus duty @ 20%, though duty at higher rate was indicated in the statutory invoices. The assessee produced books of account along with certificates issued by their Chartered Accountant. These documents clearly indicated that the Excise Duty (10%) paid by the assessee was kept as "Receivable from Government" or "Current Assets" in the books of account. The factual position was clear from the contemporary accounts and the certificates issued by the Chartered Accountant. Hence, the refund claim ought not to have been rejected on the ground of unjust enrichment. The Tribunal considered the materials and evidence and held as follows:-

> "4. We have considered these submissions also. It is true that, in the present case, there has been some price increase during the course of the above period as evidenced by the relevant commercial invoices. The Revenue has not shown that such price increase was not reflected in the statutory invoices. Hence the ratio of the apex court's decision has not been correctly applied to the facts of this case by the ld. SDR. In the case of Pride Foramer (supra) cited by learned counsel, Balance Sheets and Chartered Accountants' certificates were considered by the Tribunal and it was held that the assessee had succeeded in establishing that the burden of duty had not been passed on to their buyers. In the present case, it is not in dispute that the Chartered Accountant's certificates and

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books of accounts for the period of dispute were produced by the assessee to show that the Excise Duty paid in excess was retained as "receivables from Govt.". The lower authorities have not rebutted the authenticity of the documentary evidence adduced by the assessee. In the circumstances, as in the case of Pride Foramer (supra), we must hold that presumption of unjust enrichment under Section 12B of the Central Excise Act was successfully rebutted by the assessee.

5. In the result, the claim for cash refund of the excess Excise Duty requires to be allowed. It is ordered accordingly. The appeal stands allowed."

From a reading of the above, it is clear that the Tribunal had given a factual finding that only 20% of duty alone was collected from the customer and the balance of 10% is not collected or not passed on to the customers. The above fact was also amply proved by the certificates of the Chartered Accountant as well as books of account for the period in dispute. Hence, the reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference.

5. Under the circumstances, no substantial questions of law arise for consideration of this Court and accordingly the Civil Miscellaneous Appeal is dismissed. Consequently, M.P.No.1 of 2007 is closed. No costs.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Assistant Registrar,
   Customs, Excise & Service Tax Appellate Tribunal,
   South Zonal Bench,
   Shastri Bhawan Annexe,
   I Floor, 26, Haddows Road,
   Chennai-600 006.

2. The Commissioner (Appeals),
   Office of the Commissioner of Central Excise (Appeals),
   Chennai-600 034.

3. The Assistant Commissioner,
   Office of the Assistant Commissioner of Central Excise,
   Chenglepet Division, Tambaram, Chennai-45.

4. The Commissioner of Central Excise, Chennai III
Commissionerate,Chennai 34

+ one cc to Mr. K. Ravichandrababu, Advocate sr no. 32798

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